1999

# Robert J. Baczuk v. Salt Lake Regional Medical Center and Dr. Brian Moench : Brief of Appellant

Utah Court of Appeals

**IN THE UTAH COURT OF APPEALS**

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| ROBERT J. BACZUK,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>SALT LAKE REGIONAL MEDICAL CENTER and DR. BRIAN MOENCH,<br><br>Defendants/Appellees. | Court of Appeals No. 990787-CA<br><br>Argument Priority 15 |

# BRIEF OF APPELLANT

**APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT**
**THE HONORABLE HOMER F. WILKINSON**

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## STATUTES & RULES

## STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to the provisions of Utah Code Ann. § 78-2a-3(j)(Rep. Vol. 9 1996).

## STATEMENT OF ISSUE PRESENTED

Did the Court below err in granting defendants summary judgment based on plaintiff's failure to present expert testimony on the standard of care?

## STANDARD OF REVIEW

The granting of a motion for summary judgment is reviewed for correctness without deference to the court below. Thompson v. Jess, 1999 UT 22.

## STATEMENT OF THE CASE

Plaintiff Robert Baczuk was injured in a snow blower accident on November 18, 1994. He was taken to the Salt Lake Regional Medical Center where he underwent surgery in an effort to reattach his severed fingers. Following surgery, Mr. Baczuk noted that he had suffered what appeared to be a burn injury to his buttocks and he had nerve damage in his right leg. Dr. Moench described his injury as a sacral burn. (R. at 61).

Mr. Baczuk brought the present action against Salt Lake Regional and Dr. Brian Moench, the anesthesiologist for his surgery, alleging that the injuries he suffered would not have occurred in the absence of negligence. During Mr. Baczuk's surgery, Dr. Moench used a heating pad in an effort to improve Mr. Baczuk's circulation to his

injured hand. Mr. Baczuk's injuries to his buttocks and leg are believed to be the result of prolonged exposure to this pad, either a burn or a pressure sore or a combination of both. (R. at 62).

Defendants both moved for summary judgment and filed cursory affidavits of experts asserting that they had reviewed Mr. Baczuk's treatment records and were of the opinion that the standard of care had not been breached in his treatment. Mr. Baczuk did not file a countering affidavit but resisted summary judgment, asserting that, under the doctrine of res ipsa loquitur, he was entitled to have a jury decide his case without having to present expert testimony on the standard of care. The trial court granted both defendants' motions.

## SUMMARY OF ARGUMENT

In Utah, a plaintiff in a medical malpractice action need not present expert testimony regarding the standard of care if he is injured during surgery to a part of his body not involved in the surgery. The Utah Supreme Court has expressly held that the doctrine of res ipsa loquitur establishes a rebuttable presumption of negligence when such an injury occurs, which presumption is sufficient, standing alone, to raise a factual issue requiring jury resolution.

## ARGUMENT

### THE PRESUMPTION OF NEGLIGENCE UNDER THE DOCTRINE OF RES IPSA LOQUITUR WAS SUFFICIENT TO DEFEAT SUMMARY JUDGMENT

Mr. Baczuk's case against Dr. Moench and the hospital is a classic example of the exception to the general rule requiring expert testimony in a medical malpractice action. Mr. Baczuk went into surgery for an injury to his hand and when he emerged from surgery he was suffering from a burn to his buttocks and a nerve injury involving his right leg. While Mr. Baczuk cannot know the exact mechanism of how he obtained these injuries, as he was unconscious under general anesthetic, he can rely on the doctrine of res ipsa loquitur to establish a prima facie case against the defendants. As the Utah Supreme Court explained in Dalley v. Utah Valley Regional Medical Center, 791 P.2d 193, 196 (Utah 1990), the

> doctrine of res ipsa loquitur is an evidentiary doctrine created to help a plaintiff establish a prima facie case of negligence using circumstantial evidence. Res ipsa loquitur requires the plaintiff to establish an evidentiary foundation which includes the following: (1) . . . the accident was of a kind which in the ordinary course of events, would not have happened had the defendants used due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant, and (3) the accident happened irrespective of any participation at the time by the plaintiff.

In Dalley, which also involved a plaintiff who received a burn during surgery, the Court held that

> it is within the knowledge and experience of laypersons that a woman with a healthy leg does not usually go into an operating room for a cesarian section and emerge with a burn on her leg without some occurrence of negligence. This type of inference does not require expert testimony concerning the standard of care and breach of that standard.

791 P.2d at 196.

The Court also noted that an anesthetized patient cannot contribute to his or her own injury. Id. Therefore, the final foundation needed for application of res ipsa loquitur is that the "instrument or thing causing the injury was at the time of the accident under the management and control of the defendant." In the context of an injury received during surgery, the Court held that such fact is, in itself, sufficient to meet this requirement.

> The very purpose of the doctrine of res ipsa loquitur is to allow a plaintiff who may have been unconscious or incapacitated during an operation the opportunity to establish negligence and causation by circumstantial evidence. A plaintiff who is under anesthesia or otherwise incapacitated can identify neither the instrumentality nor the person(s) in control of the instrumentality. To place this burden of proof upon a plaintiff is to require the impossible. Similarly, requiring plaintiff to present speculative expert testimony as to the instrumentalities in an operating room that could possibly cause the injury does not add any probative value to the circumstantial evidence that something in the operating room caused the burn and that the operating room was under the exclusive control of defendants.

791 P.2d at 197.

In this case, plaintiff believes his injuries were caused by prolonged contact with a heating pad and has named as defendants both the anesthesiologist and the employer of

the nurse who would have had control over his exposure to the heating pad. Under Dalley, this is wholly appropriate.

> Plaintiff is not required to show what the exact cause of the burn was because the purpose of res ipsa loquitur is to compel those who were awake, aware, and in control of all possible injuring instrumentalities to explain the occurrence. Once plaintiff has utilized res ipsa loquitur to establish the inference that no one but defendants could have caused the injury, the burden shifts to defendants to show that the injury could have been caused by a person or instrumentality outside of defendants' control.

791 P.2d 199.

While both defendants submitted a cursory affidavit from an expert reciting that they complied with the standard of care, such evidence does not remove the issue of negligence from being a fact question for the jury.

> Where a plaintiff receives an injury to a healthy part of the body not involved in an operation in an operating room controlled by known defendants, res ipsa loquitur establishes a rebuttable inference of negligence and causation that puts the burden of going forward with the evidence upon those persons who were awake, aware, and conscious at the time of the injury, who were responsible for the plaintiff's safety at a time when he or she was not in a position to assume that responsibility. Res ipsa loquitur infers causation, and therefore a material issue of fact exists that must be presented to the trier of fact. If plaintiff prefers to rest upon the inference of cause established by res ipsa loquitur, then that is a tactical decision that should not be short-circuited by summary judgment.

791 P.2d at 200 (emphasis added).

In reversing a summary judgment that had been granted the defendants in Dalley, the Court stated as follows:

> We hold that where the foundation of res ipsa loquitur is established, all defendants who are charged with the safety of a helpless patient may be held liable where the only possible instrumentalities that could cause injury were within the defined area of an operating room under the control of all defendants and where the injury occurred to a part of the body not involved in the operation itself. Without some further explanation by defendants of how plaintiff was injured, they are all considered in control of the instrumentality, including the hospital and the anesthesiologist.

Id.

Under the express holding of our Supreme Court, Mr. Baczuk has established his entitlement to rely on the doctrine of res ipsa loquitur to prove his case and need not provide expert testimony to avoid summary judgment. Courts in other jurisdictions have recognized that unexplained burn injuries to a patient's buttocks incurred during surgery give rise to application of res ipsa loquitur. For example, in Beaudoin v. Watertown Memorial Hosp., 145 N.W.2d 166 (Wis. 1966), the Wisconsin Supreme Court held that the trial court had improperly granted defendants a directed verdict against a plaintiff who suffered burns to her buttocks during surgery.

> [T]he evidence is undisputed that plaintiff did not have the blisters or burns before the operation. She was under the complete control of the doctor and hospital from the time she left her room until the burns were discovered. She was given an anesthetic, was unconscious, and had no way of knowing what transpired during this period.

> The defendants had complete control of her body and the procedures, instruments, and agents that were used.
>
> We are clearly of the opinion that a layman is able to conclude as a matter of common knowledge that blisters in the nature of second-degree burns in an area not directly related to the operative procedures do not ordinarily result if due care is exercised.
>
> The fact that other possibilities are suggested by the evidence is not sufficient to take away from the plaintiff the benefit of res ipsa loquitur.

145 N.W.2d at 169.

Similarly, in Wiles v. Myerly, 210 N.W.2d 619 (Ia. 1973), the Supreme Court of Iowa rejected the contention that the case of a patient, with burns to his buttocks incurred during surgery, should have been subject to a directed verdict for failure to present expert testimony on the standard of care.

> Common knowledge and experience teach us that in the ordinary course of events one undergoing surgery does not sustain unusual injury to a healthy part of his body not within the area of the operation in the absence of negligence. In other words, one does not expect that in the ordinary course of events a patient would go into an operation for vascular surgery and come out with second and third degree burns on his buttocks.

210 N.W.2d at 626.

Having established a prima facie case of negligence, Mr. Baczuk was entitled to have his case submitted to the jury, especially where the affidavits of defendants' experts did not even try to explain any nonnegligent cause of his injuries. As noted by

the Iowa Court, "res ipsa raises an inference of negligence whose weight is for the jury, regardless of the explanatory evidence opposing it." Id. at 627.

## CONCLUSION

Mr. Baczuk suffered an injury to a previously healthy part of his body while under the care of the defendants during a surgery not involving that portion of his body. Under the express holding of Dalley, supra, this fact alone entitles him to rely on res ipsa loquitur to establish the presumption of negligence against those charged with his care. Accordingly, it was an error for the court below to grant summary judgment. The judgment should be set aside and the case remanded for trial.

## STATEMENT REGARDING ADDENDUM

No addendum is required.

DATED this 15th day of February, 2000.

PRINCE, YEATES & GELDZAHLER

By M. David Eckersley
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Attorneys for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2000, I caused the original and seven (7) copies to be filed with the Clerk of the Court of the Utah Court of Appeals, and two (2) true and correct copies of the foregoing BRIEF OF APPELLANT to be mailed, first-class postage prepaid thereon, to the following:

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